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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIC JAMES MONTAGUE,

Defendant and Appellant.

C077100

(Super. Ct. No. 62114477)

A jury convicted defendant Eric James Montague of resisting an executive officer by force or violence but acquitted him of preventing or deterring an officer (Pen. Code, § 69; count one).¹ The jury also convicted defendant of simple assault, a misdemeanor (§ 240), as a lesser included offense to that charged in count three (assault on a peace officer with a deadly weapon & by means of force likely to produce great bodily injury). The jury acquitted defendant of misdemeanor battery upon an officer (count two).

The court suspended imposition of sentence and granted probation subject to certain terms and conditions including 180 days in county jail.

¹ Undesignated statutory references are to the Penal Code.

Defendant appeals, contending the trial court abused its discretion in admitting inadmissible, irrelevant and prejudicial evidence of his prior misdemeanor conviction for resisting or obstructing a peace officer, violating his rights to a fair trial, an impartial jury, and due process. We will reject this contention. Defendant also requests that this court independently review the sealed transcript of the hearing held in camera regarding disclosure of the officer's personnel records to determine whether the trial court properly denied his *Pitchess* motion.² After augmenting the record on our own motion to include the relevant materials, we have reviewed the record and find the trial court did not abuse its discretion in finding no discoverable materials in the officer's personnel records.

FACTS

In the afternoon on May 16, 2012, Roseville Police Officer Bryan Hays, in uniform and driving a marked patrol car, saw a motorcycle with expired registration tags and a rider with a "flat black" helmet. The helmet color was unusual and similar to one which had been described about 10 days earlier by another officer as worn by a motorcycle rider who successfully fled from the officer at 90 miles per hour. Based on the tag on the license plate, Officer Hays suspected the registration on the motorcycle had expired and, using his patrol car computer, confirmed his suspicion -- the registration had expired 13 months earlier. Officer Hays decided to make a traffic stop.

The patrol car and motorcycle both went south on Taylor Road. A vehicle in front of the motorcycle slowed to turn into a parking lot and, as the motorcycle slowed, the officer passed the motorcycle rider, later identified as defendant, who looked in his direction. The officer drove ahead, "park[ed] diagonally" in the motorcycle's lane with the patrol car's emergency lights activated, got out and walked to the rear of his patrol car. Defendant had stopped and put both feet on the ground about 12 feet away from the

² *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

officer. The officer walked towards defendant, advised him that he was making a stop, and that he needed to turn his motorcycle off and push it to the curb, pointing to the side of the road. When the officer was about six feet from defendant, defendant revved the engine and surged towards the officer. As the officer moved out of the way and defendant passed him, the officer pushed defendant's shoulder. The officer fell to the ground and suffered injuries. The officer heard the high pitched sound of the motorcycle and saw defendant who was having difficulty moving the motorcycle on the curb and trying to flee. The officer grabbed defendant, took him off the motorcycle, and put him in handcuffs. The officer checked defendant's driver's license and learned it had been suspended.

Officer Jed O'Rourke arrived on the scene and saw defendant sitting on the curb in handcuffs and a motorcycle lying on its side. As Officer O'Rourke walked defendant to his patrol car, defendant said, "Please don't be rough with me. I made a mistake. I knew he was running my registration. I didn't mean to hurt anyone. I just made a mistake."

Defendant testified at trial. He admitted that he knew the registration on the motorcycle had expired. He saw the patrol car in the next lane behind him but claimed he was not paying attention to what the officer was doing. Defendant admitted, however, that after the vehicle in front of him turned into the parking lot, he saw the patrol car pull in front of him four or five car lengths ahead. Defendant denied that the emergency lights on the patrol car had been activated. Defendant was listening to music inside his helmet with in-ear devices that decreased his hearing ability. He felt something strike and grab his motorcycle which caused him to jerk and pull back on the throttle. He went down the road a short distance and then the back of his motorcycle came down on the curb and spun him off. Officer Hays then jumped on top of defendant, telling him he was under arrest. Defendant denied seeing or riding his motorcycle towards Officer Hays. Defendant also denied that he had seen the patrol car's lights or that he was trying to evade the officer because of the expired registration. Defendant claimed that if he had

seen that the officer was trying to pull him over, he would have pulled over. When asked whether it would be better to hit the officer or to flee if the officer was trying to detain or arrest him, defendant said it would be better to ride away. When asked why, defendant explained he did not “feel there is any ticket worth jeopardizing someone’s life to get out of.” After an off-the-record discussion, defendant then admitted that he had been convicted in 2007 of misdemeanor resisting and obstructing a peace officer who had been investigating defendant’s vehicle which had an expired registration.

DISCUSSION

I

Defendant contends the trial court abused its discretion in admitting evidence of his misdemeanor conviction. We reject this contention.

Background

Prior to trial, the prosecutor sought to admit the prior misdemeanor misconduct pursuant to Evidence Code section 1101, subdivision (b) to prove, in connection with one theory of violation of section 69, absence of mistake and specific intent by threat of force or violence to deter police officers in general and those officers who investigate his expired vehicle registration. If the court found the evidence inadmissible in its case-in-chief, the prosecutor sought to admit the evidence to impeach defendant if he testified. The prosecutor represented that the evidence would show that when Lincoln Police Officer Jeff Wall was investigating an expired registration on defendant’s car, defendant approached the officer holding a two-foot crowbar partially over his (defendant’s) head and threatened the officer, yelling profanities, striking his (defendant’s) car, and ordering the officer to quit harassing him. Later, after defendant testified, the prosecutor added that the officer felt threatened and considered using lethal force if defendant continued to advance.

Defense counsel opposed admission of the evidence, arguing that defendant was convicted of violating section 148 and acquitted of violating section 69, so there was no

force or violence. If the misconduct evidence was admitted, defense counsel wanted to admit the evidence of the jury's verdicts of acquittal/conviction. The prosecutor disputed that defendant was acquitted of using force or violence, claiming that defendant was charged with misdemeanor violation of section 69.

The trial court concluded the prior misconduct evidence was not admissible in the prosecutor's case-in-chief but stated that it "could have some relevance as to specific intent or mistake depending upon whether [defense counsel] ma[d]e it an issue in [the] defense case. [¶] So if, for example, [defendant] testifies that he never resists police, he always does everything they ask him to do, he didn't know it was a police officer or anything that would put into question whether the defendant had the intent to obstruct an officer in this case, then it might arguably call into question whether the Court would entertain a prior incident where he did resist or obstruct an officer."

After defendant testified on direct that he would have pulled over if he had seen emergency lights and that there was no ticket worth jeopardizing someone's life to get out of, the prosecutor sought to call Officer Wall to testify about defendant's prior misconduct to impeach him. Defense counsel objected, arguing the situations were "vast[ly]" different since Officer Wall did not conduct a traffic stop but instead went to defendant's home and noted that the evidence would "extend the length of . . . trial," requiring defendant and his mother to testify about the previous incident. Defense counsel conceded that he would have liked a different answer from defendant when he responded that there was no ticket worth jeopardizing someone's life. Defense counsel argued it was prejudicial to defendant who was acquitted of a section 69 violation and convicted of only a section 148 violation. The prosecutor claimed the evidence was not unduly prejudicial.

The trial court ruled that "the defense has through your questioning or through his answers presented to the jury essentially testimony from the defendant that he would not resist or assault an officer or wouldn't do that type of conduct." To avoid a "whole side

trial,” the court determined that the prosecutor would be able to ask defendant if he had previously been convicted of resisting an officer in a situation where the officer was trying to issue defendant a citation for an expired registration. In the event defendant answered affirmatively, the prosecutor would not be able to inquire further.

When testimony resumed, defense counsel reopened and asked defendant about the 2007 “conviction for a Penal Code [section] 148 misdemeanor conviction” and defendant admitted it. Defense counsel asked whether his conviction stemmed from “an incident where an officer was checking upon [defendant’s] vehicle registration,” and defendant responded, “Yes, in my driveway.” The prosecutor asked on cross-examination whether the previous conviction was for “resisting and obstructing a peace officer” investigating a registration violation and defendant admitted that the officer was “looking” at him.

Analysis

Defendant contends the trial court abused its discretion in admitting the prior evidence because it was not relevant. Defendant argues his misdemeanor conviction which occurred six years prior to the current offense had “no tendency to prove the disputed facts of the charged offense, i.e., whose version of events was true, [defendant’s] or Officer Hays[’s].” Defendant also argues his prior was more prejudicial than probative. He claims the evidence was inadmissible under Evidence Code section 1101. He also claims the trial court’s error in admitting the evidence for impeachment violated his rights to a fair trial and due process.

The People respond that the evidence was properly admitted as a crime of moral turpitude to impeach defendant’s character for honesty and veracity and, in any event, any error was harmless.

Initially, we note that the restrictions in Evidence Code section 1101 “on the use of evidence of specific instances of prior misconduct” “do not apply to evidence offered to support or attack the credibility of a witness.” (*People v. Kennedy* (2005) 36 Cal.4th

595, 620, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459; Evid. Code, § 1101, subd. (c).) Article I, section 28, subdivision (f)(4) of the California Constitution provides that “[a]ny prior felony conviction of any person in any criminal proceeding . . . shall subsequently be used without limitation for purposes of impeachment” Subdivision (f)(2) of section 28 provides, in relevant part, that “relevant evidence shall not be excluded in any criminal proceeding Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code Sections 352, 782 or 1103.” Section 28, subdivision (f) does not limit impeachment by conduct to prior felony convictions. (*People v. Wheeler* (1992) 4 Cal.4th 284, 292-295 (*Wheeler*) [misdemeanor conduct is admissible to impeach defendant where the conduct involved moral turpitude].) Article I, section 28, subdivision (f)(2) (formerly subdivision (d)) of the California Constitution “makes immoral conduct admissible for impeachment whether or not it produced any conviction, felony or misdemeanor. . . . Thus, impeaching misconduct now may, and sometimes must, be proven by direct evidence of the acts committed.” (*Wheeler*, at p. 297, fn. 7.)

In determining the admissibility of past misconduct for impeachment purposes, the trial court must first find that the misconduct involves moral turpitude, or a “ ‘readiness to do evil.’ ” (*People v. Castro* (1985) 38 Cal.3d 301, 314 (*Castro*); *People v. Edwards* (2013) 57 Cal.4th 658, 722 (*Edwards*).) “ ‘*Castro* makes no attempt to list or define those [offenses] which involve moral turpitude, but it makes clear that moral turpitude does not depend on dishonesty being an element of the [offense].’ ” (*People v. Forster* (1994) 29 Cal.App.4th 1746, 1756.) A crime of moral turpitude includes “ ‘conduct involving violence, menace, or threat.’ ” (*People v. Williams* (1999) 72 Cal.App.4th 1460, 1464 (*Williams*).)

In addition, the court weighs the probative value against the prejudicial effect. (*Wheeler, supra*, 4 Cal.4th at pp. 296-297; Evid. Code, § 352.) In exercising that discretion, the trial court considers but need not rigidly follow four factors: (1) the extent

to which the prior conviction reflects on dishonesty; (2) the nearness or remoteness of the prior conviction; (3) whether the prior conviction is for the same or similar conduct for which the accused is on trial; and (4) whether defendant refrained from testifying. (*People v. Beagle* (1972) 6 Cal.3d 441, 453 (*Beagle*); *Edwards, supra*, 57 Cal.4th at p. 722.)

“Additional considerations apply when the proffered impeachment evidence is misconduct other than a prior conviction. This is because such misconduct generally is less probative of immoral character or dishonesty and may involve problems involving proof, unfair surprise, and the evaluation of moral turpitude. [Citation.] . . . ‘[C]ourts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value.’ [Citation.]” (*People v. Clark* (2011) 52 Cal.4th 856, 931-932 (*Clark*), quoting *Wheeler, supra*, 4 Cal.4th at pp. 296-297.)

Here, defendant’s prior misconduct which resulted in a misdemeanor conviction involved threatening Officer Wall with a crowbar while he was investigating defendant’s violation of the vehicle registration requirements. Neither section 69 (the prior offense charged against defendant) nor section 148 (the prior offense defendant was convicted of) involve dishonesty as an element.³ “Obviously it is easier to infer that a witness is lying

³ Section 69 provides: “Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by a fine not exceeding ten thousand dollars (\$10,000), or by imprisonment pursuant to subdivision (h) of Section 1170, or in a county jail not exceeding one year, or by both such fine and imprisonment.”

Section 148, subdivision (a)(1) provides: “Every person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician, as defined in Division 2.5 (commencing with Section 1797) of the Health and Safety Code, in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one

if the [offense] of which he [or she] has been convicted involves dishonesty as a necessary element,” but there is also “some basis – however tenuous – for inferring that a person who has committed a crime which involves moral turpitude other than dishonesty is more likely to be dishonest than a witness about whom no such thing is known.” (*Castro, supra*, 38 Cal.3d at p. 315, fn. omitted; *People v. Chavez* (2000) 84 Cal.App.4th 25, 28-29.) *Wheeler* held that *conduct* underlying a misdemeanor conviction is admissible impeachment evidence if it shows moral turpitude. (*Wheeler, supra*, 4 Cal.4th at pp. 295-296.) Defendant’s conduct involved moral turpitude because it demonstrated a readiness to do evil and involved a threat of violence and force against the officer. (See *Williams, supra*, 72 Cal.App.4th at pp. 1464-1465.) The evidence of defendant’s prior misconduct was thus relevant on the question of his veracity and was admissible to impeach him.⁴

The trial court could properly admit defendant’s prior misconduct evidence for impeachment provided its probative value was not substantially outweighed by the probability that its admission would “(a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.) Considering the factors set forth in *Beagle, supra*, 6 Cal.3d 441, the first, second, and fourth factors weighed in favor of admitting the evidence: defendant’s prior misconduct involved a crime of moral turpitude and therefore reflected on his veracity, the prior misconduct occurred only six years prior to the current offense (see *People v. Carpenter* (1999) 21 Cal.4th 1016, 1055-1056 [upholding admission of

thousand dollars (\$1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment.”

⁴ When defendant testified, he was impeached not with the underlying conduct but with the conviction itself. Defense counsel obviously believed it better for the jury to hear of the misdemeanor conviction rather than the underlying conduct because Officer Wall would have testified and explained how defendant had threatened him with a crowbar and that he (the officer) feared for his life.

two 17-year-old convictions]), and defendant testified after having been warned prior to trial that he may be impeached with the misconduct. Although the prior misconduct was similar to the current offense, it was not dispositive considering that the other factors weighed in favor of admitting the impeachment evidence. (*Clark, supra*, 52 Cal.4th at p. 932.)

Although credibility was the issue at trial, the jury convicted defendant of resisting the officer but acquitted defendant of preventing or deterring the officer. The jury also convicted defendant of simple assault, a lesser offense to that charged in count three (assault on a peace officer with a deadly weapon & by means of force likely to produce great bodily injury), and acquitted defendant of misdemeanor battery on the officer. The jury's verdicts demonstrate that it considered the evidence without being unduly influenced by defendant's prior resisting conviction.

Given defendant's testimony that he would not have resisted or assaulted an officer because he did not "feel there is any ticket worth jeopardizing someone's life to get out of," the evidence that he had, on a prior occasion, resisted or threatened to assault an officer performing his lawful duty was relevant for impeachment purposes and more probative than prejudicial. Accordingly, defendant has failed to show the trial court abused its discretion in admitting the evidence. (*People v. Ledesma* (2006) 39 Cal.4th 641, 705.) Defendant's due process and fair trial claims require no discussion in view of our conclusion that the trial court did not abuse its discretion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6.)

II

Defendant requests that we review the transcript of the hearing held in camera pursuant to *Pitchess*. We have done so and find no abuse.

Pitchess "recognized that a criminal defendant may, in some circumstances, compel the discovery of evidence in the arresting law enforcement officer's personnel file that is relevant to the defendant's ability to defend against a criminal charge. 'In 1978,

the California Legislature codified the privileges and procedures surrounding what had come to be known as “*Pitchess* motions” . . . through the enactment of Penal Code sections 832.7 and 832.8 and Evidence Code sections 1043 through 1045.’ ” (*People v. Mooc* (2001) 26 Cal.4th 1216, 1219-1220 (*Mooc*).)

Section 832.8 defines “ ‘personnel records.’ ” Section 832.7, subdivision (a), provides that the personnel records of a peace officer are generally confidential but may be disclosed pursuant to procedures established in Evidence Code sections 1043 and 1046. To obtain discovery, a defendant files a written motion with service on the governmental agency having custody of the records sought (Evid. Code, § 1043, subd. (a)), describing the type of records or information and including an affidavit showing good cause and which explains the materiality of the information to the subject matter of the pending litigation and states on “reasonable belief” that the agency has the information sought. (Evid. Code, § 1043, subd. (b).)

“If the trial court concludes the defendant has fulfilled these prerequisites and made a showing of good cause, the custodian of records should bring to court all documents ‘potentially relevant’ to the defendant’s motion. [Citation.] The trial court ‘shall examine the information in chambers’ (Evid. Code, § 1045, subd. (b)), ‘out of the presence and hearing of all persons except the person authorized [to possess the records] and such other persons [the custodian of records] is willing to have present’ (*id.*, § 915, subd. (b); see *id.*, § 1045, subd. (b) [incorporating *id.*, § 915]). Subject to statutory exceptions and limitations, . . . the trial court should then disclose to the defendant ‘such information [that] is relevant to the subject matter involved in the pending litigation.’ (*Id.*, § 1045, subd. (a).)” (*Mooc, supra*, 26 Cal.4th at p. 1226.)

“A trial court’s ruling on a motion for access to law enforcement personnel records is subject to review for abuse of discretion.” (*People v. Hughes* (2002) 27 Cal.4th 287, 330.)

Here, defendant filed a *Pitchess* motion, seeking discovery of the personnel records of Officer Hays maintained by the City of Roseville (City) and the Roseville Police Department. Specifically, defendant sought all materials, complaints, and reports relevant to the officer's credibility and veracity, prior law enforcement employment, complaints of illegal or unwarranted arrest, citizen complaints of excessive force by the officer or another officer who the officer assisted, final disposition of any complaint, discipline imposed as the result of the complaint, statements to investigators of internal affairs regarding the complaints, records concerning harassment, false arrests, racial bias, intimidation, discrimination or alleged misconduct, and mental health records. Defendant sought all such records regardless of the five-year limit (Evid. Code, § 1045, subd. (b)(1)).

In his affidavit, defense counsel stated that he believed that Officer Hays used excessive force in detaining defendant (the officer admitted pushing defendant off his motorcycle & then tackling him). Defense counsel believed that the officer made false or misleading statements in his incident report "in order to camouflage the use of excessive force in detaining [defendant]" and that the officer was "greatly more aggressive." Defense counsel expected to show at trial that Officer Hays used excessive and illegal force against defendant and that the officer's version of events was untruthful. Defense counsel believed the material sought may contain similar complaints against Officer Hays. Defense counsel believed that mental health testing had occurred with Officer Hays and that the test administrator may have formed an opinion that Officer Hays had the propensity towards excessive force, false testimony, or other acts of moral turpitude or dishonesty.

The City opposed the motion, arguing defendant had failed to show good cause, defendant's blanket request was overbroad, and the motion exceeded the page limits. The City also opposed defendant's request for mental health records, arguing defendant failed to satisfy the heightened showing required. If the motion was granted, the City

argued the information requested was limited to the previous five years and to the names/addresses/phone numbers of relevant complainants. The City also sought a protective order.

Defendant filed an amended motion, seeking to exceed the page limit, and attaching the incident reports.

At a hearing on defendant's motion, the trial court found good cause to review the personnel records of Officer Hays in camera. After reviewing the records in camera with the custodian of records and the city attorney, the trial court determined there was nothing discoverable in the personnel records of Officer Hays.

We have examined the sealed transcript of the proceedings held in camera. We agree that the custodian of records presented no discoverable material and that the trial court did not abuse its discretion.

DISPOSITION

The judgment is affirmed.

/s/
Blease, Acting P. J.

We concur:

/s/
Butz, J.

/s/
Hoch, J.